RECORD
AND
BRIEFS

No. 16-1468

In the Supreme Court of the United States

SCOTT KERNAN, *Petitioner,*

v.

MICHAEL DANIEL CUERO, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETTTIONER

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The decision below discerns in this Court's precedents a clearly established federal due process right to specific performance of a plea agreement that is withdrawn or superseded, in accordance with longstanding state procedures, before any judgment has been entered. Pet. 17-23. It likewise reads this Court's decisions as authorizing and directing federal courts to require their state counterparts to grant remedies to state criminal defendants that federal judges have concluded are required by state contract law. *Id.* at 23-26. This unjustified interference with matters of state criminal procedure warrants review and correction by this Court.

1. The case is not moot. Opp. 14-17. The decision below denies the State the ability to execute a criminal sentence accurately reflecting Cuero's recidivist history, effectively invalidating procedures that have been part of California law for decades. The issuance of the court of appeals' mandate and the entry of a new state judgment in obedience to that federal order pose no obstacle to this Court granting the State relief.

The issuance of an appellate court's mandate does not defeat this Court's jurisdiction. *E.g.*, *Carr v. Zaja*, 283 U.S. 52, 53 (1931). That principle applies even when the losing party does not obtain a stay of the mandate and complies with it pending further review. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (case not moot after government dismissed indictments following issuance of court of appeals' mandate vacating convictions); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 306-308 (1946) (controversy still live despite government's release of habeas petitioner in compliance with court of appeals' ruling); *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-467 (1947) (Court had jurisdiction to consider challenge regarding remova-

bility even though case had been remanded to state court pursuant to court of appeals' mandate).

Of particular relevance here, in *Mancusi v. Stubbs*, 408 U.S. 204 (1972), this Court held that a case does not become moot after a state court resentences a defendant in compliance with a federal writ of habeas corpus. *Id.* at 205-207. There, the court of appeals granted a federal habeas petition on the ground that a prior conviction used to increase the defendant's sentence was unconstitutional. *Id.* at 205. The State did not seek a stay, and the state court resentenced the defendant. *Id.* This Court held that the State's "obedience to the mandate of the Court of Appeals and the judgment of the District Court" did not moot the case. *Id.* at 206; *see also id.* at 206 n.1, 207 (party's performance of judgment does not disable it from seeking reversal).[1]

The same is true here. The State has complied with the court of appeals' mandate by reinstating Cuero's original plea and resentencing him under that plea. Opp. App. a1. That interim obedience to

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[1] It likewise did not matter that, after remand from the court of appeals, the state court resentenced the defendant to the same term, using a different prior conviction to support the enhanced second-offender sentence. *Mancusi*, 408 U.S. at 205-206. Because the defendant's appeal of that sentence remained pending, it could not "be said with certainty," without regard to this Court's resolution of the issue before it for review, "that the [state] courts [could] validly resentence [defendant] to the same term as they imposed prior to the decision of the Court of Appeals." *Id.* at 206. The State therefore maintained an interest in challenging the invalidation of the initial prior conviction. *Id.* Here, the court of appeals required the State to resentence Cuero to a substantially lower term than the state superior court originally imposed, and would impose again if freed from the constraint of a federal judicial order to the contrary. The State therefore maintains a substantial interest in challenging the federal ruling.

the court of appeals' judgment does not disable the State from seeking to have that judgment reversed.[2]

Cuero argues that in this case the state superior court not only resentenced him but re-entered his original guilty plea. Opp. 15-16, 15 n.5. That distinction is not relevant. When a habeas petitioner obtains relief "through the assertion of judicial power," and not by the custodian's voluntary action, the custodian's compliance with the judicial order does not deprive this Court of jurisdiction. *Eagles*, 329 U.S. at 315-316 (reversal "undoes what the habeas corpus court did").[3]

Here, the court of appeals ordered the State to resentence Cuero "in accordance with the original plea agreement" within sixty days of the mandate's issuance. Pet. App. 24a; *see also* Dist. Ct. Dkt. 73

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[2] In proceedings below, Cuero appeared to recognize as much. In opposing a stay and recall of the mandate in the court of appeals, he explained that if he finished serving the shorter sentence required by that court's ruling and then this Court reversed, "the state [could] re-arrest him," and he would "then finish serving his reimposed sentence." C.A. Dkt. 75 at 4-5 (footnote omitted).

[3] The federal cases on which Cuero relies (at 15-17) are inapposite. In *St. Pierre v. United States*, 319 U.S. 41 (1943) (per curiam), the case was moot because the petitioner had fully served his challenged sentence and would suffer no further penalty or disability as a result of the lower court's ruling. *Id.* at 42-43; *see also Spencer v. Kemna*, 523 U.S. 1, 7-8, 14-18 (1998) (challenge to parole revocation moot where sentence was served and petitioner would suffer no continuing, concrete injury attributable to the revocation). Here, the State is suffering concrete, continuing injury as a result of the court of appeals' decision to set aside a duly imposed sentence that accurately accounts for Cuero's substantial criminal history in accordance with state law and that reflects his final plea agreement with the State.

(district court's order on remand requiring "State to resentence Mr. Cuero to a term of imprisonment of no more than fourteen years and four months and four years of parole in accordance with his original plea agreement"). Thus, in "reinstat[ing]" Cuero's original plea and resentencing him consistent with the terms of that plea, Opp. App. a1, the state court simply implemented the federal courts' command. Under the precedents described above, that compliance does not render this case moot.

Cuero argues that, as a matter of state procedure, there is no longer any way for the trial court to reinstate the 25-years-to-life sentence that it previously imposed. Opp. 15. That is incorrect. The state court acted only to comply with the federal writ issued in this case, and it would have the authority to undo that compliance and reinstate a proper state judgment if this Court were to reverse and order that writ vacated. Cuero has cited, and the State is aware of, no authority that would bar that result.[4] There is no barrier to this Court's review.

2. That review is warranted because the decision below seriously oversteps AEDPA's bounds and effectively invalidates a state procedure that has been part of California law for over eighty years. Pet. 16, 26-27. Cuero seeks to downplay the significance of that result; but he concedes that it will disable the State from amending charging documents after an initial plea has been entered, as otherwise authorized under Penal Code section 969.5, in any case involving a plea agreement. Opp. 17-18. That result is contrary to the California Legislature's judgment that "all known prior felony convictions of

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[4] On the contrary, California courts are authorized to set aside any criminal judgment that is void on the face of the record. *See People v. Amaya*, 239 Cal. App. 4th 379, 386 (2015).

an accused [should] be pleaded" and that the early entry of a guilty plea should not defeat prosecutors' ability to discover and accurately charge all of a defendant's prior felonies. *See People v. Valladoli*, 13 Cal. 4th 590, 602 (1996).

Cuero errs in claiming (at 19-20) that section 969.5 did not authorize the prosecution to amend its accusatory pleading to reclassify a previously alleged conviction as a "strike." The state trial court concluded otherwise in granting the prosecution's motion to amend. *See* Pet. App. 178a-180a; *see also* Pet. 4-5 (statutory authority to amend charging documents honors Legislature's policy decision that criminal charges generally should reflect all felonies that qualify as "strikes"). Cuero further errs in claiming that Penal Code section 1192.5 prohibited the superior court from sentencing him to 25 years to a life, a sentence longer than provided for in his original, subsequently superseded, plea agreement. Opp. 21 n.8. The language he emphasizes prohibits a trial court from sentencing a defendant "*on the plea* to a punishment more severe than that specified in the plea...." (emphasis added). The plea on which Cuero was sentenced—his final agreement with the State based on amended charges—provided for the longer sentence. Pet. 8-9.

3. The court of appeals' decision to overturn the state court's judgment reflects a clear departure from this Court's precedents. This Court's decisions do not establish (much less "clearly establish," as AEDPA requires) a federal due process right to specific performance of a plea agreement that was superseded, under state procedures, before the entry of any judgment of conviction. Pet. 17-22. Cuero seeks to locate such a right primarily in this Court's decisions in *Mabry v. Johnson*, 467 U.S. 504 (1984), *overruled in part on other grounds by Puckett v. United*

States, 556 U.S. 129 (2009), and *Santobello v. New York*, 404 U.S. 257 (1971), but neither case supports his argument. *See* Opp. 23-25, 24 n.11. *Santobello* held that a defendant may not be bound to a plea agreement that the prosecution breaches. 404 U.S. at 262. It did not address the very different situation, at issue here, where a state trial court approves changes to the charging document and releases both parties from an initial plea agreement. *See id.* at 258-260, 262. *Santobello* thus provides no basis for overturning the judgment here on federal habeas review. *See, e.g., Woods v. Donald*, __ U.S. __, 135 S. Ct. 1372, 1377 (2015) (per curiam) (habeas relief improper where this Court's prior decisions did not "deal[] with circumstances like those present here").

Mabry held that a defendant was *not* entitled to enforce a plea offer that the prosecution revoked after the defendant tried to accept it. 467 U.S. at 506, 510-511. Cuero ignores this holding and argues that *Mabry* establishes a broad principle that a "guilty plea triggers due process protections." Opp. 24 n.11. But while *Mabry* noted that a guilty plea "implicates the Constitution," it confirmed that a plea agreement is only "executory" until "embodied in the judgment of a court." 467 U.S. at 507-508. Because Cuero's initial plea was never embodied in a judgment, the state court's decision to allow the prosecution to amend its complaint, while permitting Cuero to withdraw his plea, was consistent with *Mabry*. Pet. 20-21. Cuero disagrees with this reading of *Mabry* (Opp. 24 n.11), but he never contends that it is "so lacking in justification" that there could be no "fairminded disagreement" on the matter, as would be required for a federal habeas court to set aside a state judgment. *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see also* Pet. App. 51a-52a, 52a nn.13, 14 (dissenting opinion); *White v. Woodall*, __ U.S. __, 134

S. Ct. 1697, 1704 (2014) (argument that "disregards perfectly reasonable interpretations" of decisions of this Court "contravenes [28 U.S.C.] § 2254(d)'s deferential standard of review").[5]

Cuero's remaining arguments (Opp. 25-28) only highlight how far the decision below strays beyond proper AEDPA bounds. Cuero claims that the court of appeals correctly applied California law in determining that the prosecution breached the initial plea agreement and in ordering the state court to require specific performance of Cuero's withdrawn plea. *Id.* at 25-26. That confirms the State's point. A federal habeas court may not set aside a state criminal judgment based on perceived errors of state law. *See* Pet. 23-26. The court of appeals disregarded that fundamental limitation on federal habeas jurisdiction by considering for itself "whether the state court decision [was] consistent with a proper application of state contract law" and ordering a remedy—specific

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[5] The State's reading of *Mabry* is consistent with *Santobello*. *See* Opp. 24 n.11. Although the prosecution in *Santobello* violated its plea agreement at sentencing, Santobello suffered a constitutional violation when the trial court entered judgment and sentenced him based on that breached agreement. *See* 404 U.S. at 260-262. *Santobello* also demonstrates that there is no basis for concern about defendants' ability to preserve claims of breach. *Id.* at 259 (defense counsel objected to prosecutorial breach in trial court proceedings).

Cuero also quotes from the statement in *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), that "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *See* Opp. 23. That statement is taken entirely out of context. *Boykin* involved whether a defendant's guilty plea was knowingly and voluntarily entered. 395 U.S. at 244. It did not address the question at issue here.

performance of Cuero's superseded plea agreement—that it believed California law required. Pet. App. 16a (alterations and internal quotation marks omitted), 21a-22a; Pet. 23-24.

The court of appeals' decision to order specific performance of Cuero's superseded plea also seriously misapplies this Court's decisions in *Santobello*, 404 U.S. 257, and *Mabry*, 467 U.S. 504. As *Mabry* explains, *Santobello* "expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for [a breached] plea." *Mabry*, 467 U.S. at 510 n.11. The Court "made it clear that permitting [a defendant] to replead [is] within the range of constitutionally appropriate remedies." *Id.* Further, under *Santobello*, state courts, not federal habeas tribunals, are "in a better position to decide" the appropriate remedy for any prosecutorial breach. *See* 404 U.S. at 263; *see also* Pet. 22-23.[6]

The court of appeals in this case exceeded the established bounds of federal habeas review. No clearly established law of this Court provides Cuero with a federal due process right to reinstatement of a plea agreement that was superseded and withdrawn, in accordance with longstanding state procedures, before the judgment of conviction was entered. This Court's precedents also make clear that a perceived error of state law cannot be a proper basis for a federal writ overturning a state criminal judgment.

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[6] Cuero points to this Court's decision in *Neale v. Neales*, 76 U.S. 1 (1869), as support for the court of appeals' chosen remedy here. Opp. 26. That decision held that a father's promise to convey a plot of land in the District of Columbia to his daughter-in-law was subject to specific enforcement in a proceeding properly brought and resolved directly in the federal courts. *Neale*, 76 U.S. at 10-12. It is completely inapposite here.

These fundamental errors warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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